Supreme Court, U.S.
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NO. 07-____

IN THE

Supreme Court of the United States

Peter Boggan,
Petitioner,

v.

Mississippi Conference of the United Methodist Church.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 27, 2007

QUESTIONS PRESENTED

1. Should this Court grant certiorari to resolve the six-to-one circuit conflict over whether the Religious Freedom Restoration Act is constitutional as it applies to federal law?

2. Should this Court grant certiorari to resolve the one-to-one circuit conflict over whether the alleged ministerial exception to Title VII of the Civil Rights Act of 1964 is valid under the Religious Freedom Restoration Act?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Peter Boggan, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-2a) is unpublished. The district court's order granting the motion to dismiss in favor of respondent (Pet. App. 3a-9a), dated May 5, 2006, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 2007. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

The Religious Freedom Restoration Act (RFRA) provides the following:

> (1) Whether the claims sought by the plaintiff are in furtherance of a compelling governmental interest; and
> (2) Whether those claims are the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §2000bb-1(b).

STATEMENT

Petitioner alleges that respondent violated Title VII of the Civil Rights Act of 1964 by placing him on administrative leave without pay for not spending the night at the church's parsonage for at least five (5) nights out of the week while numerous white pastors who do not spend the night at their church's parsonage for at least five (5) nights out of the week had no adverse action taken against them. In addition, petitioner and other black pastors who are employed by the respondent have not been promoted to higher paying church positions because of their race.

It is alleged that the respondent has continually only offered churches with majority black congregations to its black pastors, which on average pay less to their pastors than churches with majority white congregations while numerous white pastors with less experience are promoted over black pastors with more experience to churches with higher salaries. Respondent has argued that Title VII does not apply because of an alleged ministerial exception. In the current case, the Fifth Circuit continued to maintain a split in the circuits by holding that the RFRA does not apply to federal law.

1. Reverend Boggan, filed his charge of discrimination against the Mississippi Conference of the United Methodist Church with the Equal Employment Opportunity Commission on March 31, 2005, alleging race discrimination. He was issued a Notice of Right to Sue letter by the Equal Employment Opportunity Commission on July 1, 2005 and proceeded to file his Complaint against the respondent

on Aug[illegible], 2005 in the Circuit Court for the First Judicial [illegible]trict of Hinds County, Mississippi.

2. In his Complaint, petitioner alleged claims of race discrimination pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The respondent consented to the jurisdiction of and removed the current case to the United Stated District Court for the Southern District of Mississippi, Jackson Division on September 12, 2005. On October 11, 2005, respondent filed its Answer wherein its sixth defense, the respondent plead the doctrine of the "ministerial exception." Subsequently, on March 2, 2006, the respondent filed its Motion to Dismiss alleging that the respondent is exempt from the requirements and provisions of Title VII and 42 U.S.C. § 1981, under the so-called "ministerial exception." On May 5, 2006, the district court granted the respondent's motion to dismiss.

3. On May 10, 2006, the petitioner appealed the district courts opinion to the United States Court of Appeals for the Fifth Circuit. On February 1, 2007, the Fifth Circuit affirmed the district court's opinion that the RFRA was unconstitutional as it applies to federal law, and that an alleged "ministerial exception" applies to Title VII claims of race discrimination.

This petition followed.

REASONS FOR GRANTING THE WRIT

The circuits are intractably split over both questions presented by the petitioner. Given the importance of the RFRA and Title VII, such a conflict is untenable. This case presents the ideal vehicle to decide these important and frequently litigated issues. Finally, the Fifth Circuit erred in concluding that the RFRA is unconstitutional as applied to federal law, and that an alleged "ministerial exception" exists under Title VII.

I. The Courts of Appeals Are Intractably Split over the Questions Presented.

In response to this Court's opinion in *Employment Division, Department of Human Resources of Oregon, et al. v. Smith*, 494 U.S. 872 (1990), Congress passed the RFRA, creating a two-part test:

> (1) Whether the claims sought by the plaintiff are in furtherance of a compelling governmental interest; and
> (2) Whether those claims are the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §2000bb-1(b). The intent of Congress in enacting the RFRA was clearly to reestablish the "compelling interest" test set out in *Sherbert v. Verner*, 374 U.S. 398 (1963). This Court later declared that the RFRA exceeded Congress' Section 5 enforcement powers in *City of Boerne v. P.F. Flores, et al.*, 521 U.S. 507 (1997), and held that the RFRA

was unconstitutional as it applies to state law.

While this Court has not addressed the constitutionality of the RFRA as it applies to federal law, six circuits -the Second, Fourth, Seventh, Eighth, Ninth, and D.C. Circuit- squarely hold that the RFRA is constitutional when applied to federal law. *Hankins v. Lyght*, 441 F.3d 96, 105 (2nd Cir. 2006); *See also O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003); *Guam v. Guerrero*, 209 F.3d 1210, 1221 (9th Cir. 2002); *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C.Cir. 2001); *Kikumura v. Hurley*, 242 F.3d 950, 960 (9th Cir. 2001); *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 856 (8th Cir. 1998) and *Madison v. Riter*, 355 F.3d 310, 315 (4th Cir. 2003). In contrast, the Fifth Circuit has held that the RFRA is unconstitutional when applied to federal law. *Reverend Pamela Combs v. The Central Texas Annual Conference of the United Methodist Church, et al.*, 173 F.3d 343 (5th Cir. 1999).

Additionally, this Court has made no opinion as to the applicability of the alleged "ministerial exception" to Title VII. In 1972, the Fifth Circuit acknowledged the existence of an alleged "ministerial exception" to Title VII. *McClure v. The Salvation Army* 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972). Since this opinion was published, a total of seven additional circuits have acknowledged the alleged "ministerial exception." *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000); *Young v. N. Ill. Conference Of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994); *Scharon v. St. Luke's Episcopal*

Presbyterian Hospital, 929 F.2d 360 (8th Cir. 1991); *Werft v. Desert S.W. Annual Conference of the United Methodist Church,* 377 F.3d 1099 (9th Cir. 2004); *Gellington v. Christian Methodist Episcopal Church, Inc.,* 203 F.3d 1299 (11th Cir. 2000); *Petruska v. Gannon University, et al,* 448 F.3d 615 (3rd Cir. 2006) and *Minker v. Baltimore Annual Conference of the United Methodist Church,* 894 F.2d 1354 (D.C. Cir. 1990). In contrast, the Second Circuit held that "ministerial exception" to Title VII did not exist. *Hankins v. Lyght,* 441 F.3d 96, 105 (2nd Cir. 2006).

While numerous circuits have discussed the constitutionality of the RFRA and the alleged "ministerial exception" to Title VII, only two circuits have addressed the applicability of the RFRA to Title VII and the "ministerial exception." *See Hankins v. Lyght,* 441 F.3d 96, 105 (2nd Cir. 2006); *Reverend Pamela Combs v. The Central Texas Annual Conference of the United Methodist Church, et al.,* 173 F.3d 343 (5th Cir. 1999).

II. The Circuit Conflict is Untenable Given the Importance of the Questions Presented.

Millions of employees currently employed in the United States are protected by Title VII. As of May 2005, there were an estimated 36,590 clergy employed across the United States. U.S. Department of Labor, Bureau of Labor Statistics, at http://www.bls.gov/oes/current/oes212011.htm (last visited March 25, 2007). Because the Act covers so many employees, the questions presented are of great importance to the national economy and to the issue of separation of church and State.

It is therefore unsurprising that nine circuits have taken a position on the "ministerial exception," seven circuits have taken a position on the constitutionality of the RFRA, and some have faced these same issues repeatedly. The importance of this question is heightened because it is outcome determinative. Where claims of race discrimination by clergy are available, they are able to vindicate their rights in the federal courts. In contrast, where the cognizability of such claims have been rejected, pastors are left without a remedy when they have been subjected to policies that unfairly disadvantage them and subject them to race discrimination.

The frequent recurrence of this issue and its importance to thousands of Americans makes the conflict among the circuits untenable. Under the current legal regime, the scope of an employee's federal rights varies within the location of his or her employment. As long as the circuits disagree, pastors in Jackson, New York (within the Second Circuit) are protected against race discrimination, whereas pastors in Jackson, Mississippi (within the Fifth Circuit) are not. The present situation also creates special difficulties for employees of religious organizations with multiple locations nationwide, most of whom are likely unaware that the acceptance of a transfer or promotion to another location may strip them of rights that they would otherwise have. Indeed, forum selection clauses in employment contracts may deprive even those employees who work within circuits that do not recognize the "ministerial exception" of the rights enjoyed by their neighbors.

The central role that Title VII, 42 U.S.C. §

1981 and the RFRA plays in thousands of Americans *employment relationships underscores the need for* clear guidance from this Court.

III. The Fifth Circuit's Decision is Wrong on the Merits.

Congress enacted Title VII in 1964 to forbid employers to "fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race..." 42 U.S.C. § 2000e-2(a)(1). Originally, the House version of §702 contained in H.R. 7152 granted religious organizations a blanket exemption from the provisions of Title VII. Yet, the exemption proposed by the House was sizeably limited by Substitute Senate Amendment No. 656, which was what ultimately became law.

This Amendment removed the generalized exemption of religious organizations. All that remained was a narrowly tailored exemption that allowed a particular denomination to refuse to hire anyone who is not of that denomination for positions involving ministerial functions. Clearly, the language and history of §702 leads one to believe that Congress did not intend that a religious organization should be exempt from the dictates of §702 merely because it is a religious organization.

Though the Fifth Circuit recognized the desire of Congress to prevent generalized legislative exemption in *McClure*, the Fifth Circuit became the first circuit to judicially recognize the "ministerial

exception" by refusing to apply the "compelling interest" test created by the Supreme Court in *Sherbert v. Verner,* 374 U.S. 398 (1963). Congress later incorporated the "compelling interest" test into statute by enacting the RFRA.

While the Fifth Circuit has declared that the RFRA was held unconstitutional as it applies to federal law, the Fifth Circuit has never given any explanation as to why it contends the RFRA is unconstitutional as applied to federal law. *Combs,* 173 F.3d 343 (5th Cir. 1999). This Court declared the RFRA unconstitutional as it applies to state law because it exceeded Congress' Section 5 enforcement powers. *City of Boerne,* 521 U.S. 507 (1997). Essentially, this Court found that Congress had created a law that surpassed the protections of the Fourteenth Amendment, and thus violated the separation of powers between federal and state. *Id.* While there is no dispute as to the reason why the RFRA is unconstitutional as applied to state law, that same reasoning would not hold true when the RFRA is applied to federal law.

The Fifth Circuit has argued that an individual's pursuit of a Title VII claim would involve a "governmental action" in the *McClure* case when it states:

> An application of the provisions of Title VII to the employment relationship which exists between The Salvation Army and Mrs. McClure, a church and its minister, would involve an investigation and review of these practices and decisions and

> would, as a result, **cause the State to intude upon matters of church administration** ...

McClure, 460 F.2d at 560 (emphasis added). Title VII is a neutral law designed to apply to every employer in order to protect every employee from discriminatory treatment.

> There is a compelling as well as reasonable government interest in the interdiction of racial discrimination which stands on the highest constitutional ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War.

Green v. Connally, 330 F.Supp. 1150, 1167 (D.C. Cir. 1971). As such, it is clear that Title VII prohibits racial discrimination of pastors, and that the alleged "ministerial exception" does not exist.

Unless settled by this Court, this intractable and widely acknowledged split among the courts of appeals will continue to produce results that arbitrarily differ according to the jurisdiction in which Title VII claims brought by pastors are litigated. As a prototypical racial discrimination claim by a pastor, this case would serve as an ideal vehicle to examine whether an alleged "ministerial exception" actually exists. Finally, the decision reached by the court below incorrectly barred

petitioner's Title VII claim, and should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should
be granted.

Respectfully submitted,

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April 27, 2007[1]

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[1] Counsel for petitioner was principally assisted by Robert Nicholas Norris, who is an associate with Louis H. Watson, Jr., P.A. that will be seeking admission before this Court at the completion of his third year of practice in October 2007.

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60782

PETER BOGGAN,

Plaintiff-Appellant

MISSISSIPPI CONFERENCE OF THE
UNITED METHODIST CHURCH,

Defendant-Appellee

Appeal from the United States District Court
the Southern District of Mississippi
(3:05-CV-553)

BEFORE SMITH, WIENER, and OWEN, Circuit Judges.
PER CURIAM:*

Plaintiff-Appellant Peter Boggan, a Methodist minister

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

previously employed as a pastor by Defendant-Appellee Mississippi Conference of the United Methodist Church ("MCUMC"), appeals the district court's Rule 12(b)(6) dismissal of his Title VII and 42 U.S.C. § 1981 action grounded in race discrimination. As fully explained by the court in its Memorandum Opinion and Order of May 5, 2006, Boggan's claims failed to present any basis for possible recovery, as they are among the larger class of employment discrimination claims that are barred by the so-called minister-clergy exception, which is firmly rooted in the Free Exercise clause of the First Amendment to the United States Constitution. The district court rejected both of Boggan's alternative arguments, viz., that (1) our holdings in Combs v. Central Texas Annual Conference of the United Methodist Church, 173 F.2d 343 (5th Cir. 1999) and Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999), which continued to approbate this exception, are not good law and should be rejected by this court, and (2) alternatively, his claim remains cognizable because elimination of race discrimination, as compelling government interest, should be addressed under the two-part test of the Religious Freedom Restoration Act ("RFRA"), by application of Title VII and § 1981, if —— as Boggan contends —— the Supreme Court's declaration of the RFRA's unconstitutionality in City of Boerne v. Flores, 521 U.S. 507 (1997) does not apply to federal law.

Having thoroughly reviewed the facts of this case and the applicable law as reflected in the record on appeal and the briefs of the parties, we are convinced that the district court ruled correctly in dismissing Boggan's action under Rule 12(b)(6). Our 1999 holdings in Combs and Starkman remain fully viable and controlling. Unless they are nullified by some future holding of the Supreme Court of the United States or by this court en banc, the courts of this circuit continue to be bound by the holdings of Combs and Starkman. For

essentially the reasons cogently and correctly expressed by the district court, its judgment of dismissal is, in all respects, AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

PETER BOGAN PLAINTIFF

VS. CIVIL ACTION NO. 3:05CV553LN

MISSISSIPPI CONFERENCE OF THE
UNITED METHODIST CHURCH DEFENDANT

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of defendant Mississippi Conference of the United Methodist Church (Mississippi Conference) to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff Peter Bogan has responded in opposition to the motion and the court, having considered the memoranda of authorities, together with attachments, concludes that defendant's motion is well taken and should be granted.

According to his complaint filed on August 5, 2005 in the Circuit Court of Hinds County, Mississippi, plaintiff Peter Bogan, who is black, became employed by defendant Mississippi Conference as a pastor in 1979, and remained so employed until June 2004, when he was put in the position of having to resign after being placed on extended administrative leave without pay. He filed this action claiming race discrimination in violation of Title VII and 42 U.S.C. § 1981 based on allegations that (1) he was placed on administrative leave without pay in March 2004 for not spending the night at the church's parsonage for at least five nights out of the week,

while no adverse action has been taken against numerous Caucasian pastors who do not spend the night at their church parsonages five nights of the week, and that (2) he and other African-American pastors employed by defendant have not been promoted to higher paying church positions because of their race, as defendant has "continually only offered churches with majority African-American congregations to its African-American pastors, which on average pay less to their pastors than churches with majority white Caucasian congregations," and that as a result, "[n]umerous Caucasian pastors with less experience are promoted over African-American pastors with more experience to churches with higher paying salaries."

In light of the federal nature of plaintiff's claims, defendant removed the case, and thereafter filed the present motion to dismiss, contending that it is immune from the claims asserted by plaintiff due to the "ministerial exception," or "minister-clergy exception," to employment discrimination claims, first articulated by the Fifth Circuit in McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).

In McClure, the Fifth Circuit held that the Free Exercise Clause of the First Amendment** precludes courts from intruding into the employment relationship between a church and its ministerial employees. After observing that the First Amendment has built a "high and impregnable" "'wall of separation'" between church and state, id. (citations omitted), the court explained,

> Only in rare instances where a

**The First Amendment provides, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

> "compelling state interest in the regulation of a subject within the State's constitutional power to regulate" is shown can a court uphold state action which imposes even an "incidental burden" on the free exercise of religion. In this highly sensitive constitutional area "'[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'". Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). Restrictions on the free exercise of religion are allowed only when it is necessary "to prevent grave and immediate danger to interests which the state may lawfully protect".

Id. Characterizing the relationship between an organized church and its ministers as "its lifeblood," the court observed,

> The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government,

> so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.

Id. at 558-59; id. at 559 (practice of religious denominations to determine matters dealing with "the very terms of a minister's calling" is "both basic and traditional"). Then, after referencing and discussing a number of Supreme Court cases which collectively expressed "'a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine[,]'" id. at 560 (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116, 73 S. Ct. 143, 154, 97 L. Ed. 120 (1952)),*** the court concluded that "the application of the provisions of Title VII to the employment relationship existing between . . . a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment." Id. The court elaborated on this notion, stating,

> An application of the provisions

***See also McClure, 460 F.2d at 560 (describing succession of cases in which the Supreme Court had "place[d] matters of church government and administration beyond the purview of civil authorities) (citing, inter alia, Watson v. Jones, 13 Wall. 679 80 U.S. 679, 20 L. Ed. 666 (1871)).

of Title VII to the employment relationship which exists between . . . a church and its minister, would involve an investigation and review of these practices and decisions and would, as a result, cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern. Control of strictly ecclesiastical matters could easily pass from the church to the State. The church would then be without the power to decide for itself, free from state interference, matters of church administration and government. Moreover, in addition to injecting the State into substantive ecclesiastical matters, an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment. As was

> said by Justice Clark in School District of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963), "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent * * *".

Id.

In response to defendant's motion, plaintiff argues that McClure's ministerial exception is no longer valid in the wake of the Supreme Court's subsequent decision in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), in which the Supreme court specifically rejected the "compelling state interest" test set forth in Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), which the Fifth Circuit referenced in McClure. The court in Smith held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." Id. at 879, 110 S. Ct. at 1600 (citations and internal quotation marks omitted).

Plaintiff notes that although Congress passed the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (RFRA), in response to the Supreme Court's decision in Smith for the stated purpose of restoring the "compelling interest" test of Sherbert, the Supreme Court held RFRA to be unconstitutional in City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), and returned to the analysis in Smith. Plaintiff reasons that in light of Smith's

rejection of Sherbert's "compelling interest" standard, upon which McClure relied, it follows that McClure's ministerial exception cannot stand.

The problem with this argument, however, is that it has been squarely rejected by the Fifth Circuit. In Combs v. Central Texas Annual Conference of the United Methodist Church, the plaintiff questioned whether "McClure and its church minister exception still stand in light of the Supreme Court's decision in [Smith]." 173 F.3d 343, 345 (5th Cir. 1999). The court concluded that "[the] fundamental right of churches to be free from government interference in their internal management and administration has not been affected by the Supreme Court's decision in Smith and the demise of Sherbert," id. at 350, and in so holding, stated,

> We . . . disagree with Reverend Combs's argument that McClure is no longer good law because it relied on the "compelling state interest" test rejected by the Supreme Court in Smith. Our review of McClure reveals that although this Court presented the "compelling state interest" test in its general discussion of First Amendment law, the test is never applied or even mentioned later in the opinion. Thus, it is unclear how much this Court was actually relying on this test. Moreover, even if the McClure panel was relying on the Sherbert test, we hold that the church-minister exception

> survives Sherbert's demise. As the D.C. Circuit observed in Catholic University, the primary doctrinal underpinning of the church-minister exception is not the Sherbert test, but the principle that churches must be free "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Kedroff, 344 U.S. at 116, 73 S.Ct. at 154 (cited by this Court in McClure, 460 F.2d at 560, and by the D.C. Circuit in Catholic University, 83 F.3d at 462).

In his response brief, plaintiff acknowledges Combs' holding, and he acknowledges, additionally, that even subsequent to Combs, the Fifth Circuit has expanded the ministerial exception to other employees of a religious organization besides ministers where such employees' job responsibilities require them to perform ministerial functions. See Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999). In essence, though, he argues that the court in Combs came to the wrong conclusion and that this court ought recognize as much. The court is neither persuaded that Combs was wrong nor that this court would be free to disregard the Fifth Circuit's decision, even if it were not inclined to agree with it.****

****The fact that other circuits (though a minority of them) may have reached a contrary conclusion to McClure and Combs is of no moment, and thus plaintiff's citation to those

Plaintiff argues alternatively that "if, in fact, the Religious Freedom Restoration Act was not previously held unconstitutional as it applies to federal law in the Boerne case," then this court must apply the RFRA's two-part test which asks (1) whether the claims sought by the Plaintiff are in furtherance of a compelling governmental interest; and (2) whether those claims are the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1(b). Plaintiff reasons that pursuant to RFRA, his claim herein is cognizable since the elimination of race discrimination is clearly a compelling government interest and since Title VII and § 1981 are clearly the least restrictive means of furthering that interest.

Defendant submits that plaintiff's reliance on RFRA is irrelevant and misplaced for a number of reasons, including that (1) RFRA has been declared unconstitutional, without any distinction between state and federal laws, see City of Boerne, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624; (2) RFRA has not been raised in any pleading by either party to this case; and (3) RFRA does not apply to suits between private parties but rather only applies to governmental action, see 42 U.S.C. § 2000bb-1.***** Finally, it contends that even if the RFRA is

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cases avails him nothing.

***** This statute provides as follows:

(a) In general. Government shall not substantially burden a person's exercise of religion if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that the application of the burden to the person –

relevant, plaintiff's claims do not involve any burden, much less substantial burden, on his religious practice, which is the relevant inquiry under the RFRA. Defendant's argument is correct on each of these points.

Accordingly, it is order that defendant's motion to dismiss is granted.******

A separate judgment will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this 5th day of May, 2006.

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(1) is in furtherance of a compelling government interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.

(c) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

See also 42 U.S.C. § 2000bb(b)(2) (describing one of purposes of RFRA as follows: "to provide a claim or defense to persons whose religious exercise is substantially burdened by government").

****** Defendant has requested an award of reasonable attorneys' fees and costs because plaintiff's complaint is frivolous and was filed "without substantial justification" in violation of Rule 11 and Mississippi Code Annotated § 11-55-3(a). The court declines this request, except as to costs, which may properly be assessed to plaintiff.

/s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

PETER BOGAN PLAINTIFF

VS. CIVIL ACTION NO. 3:05CV553LN

MISSISSIPPI CONFERENCE OF THE
UNITED METHODIST CHURCH

DEFENDANT

JUDGMENT

Based on the court's order memorandum opinion and order entered this date, it is ordered and adjudged that the complaint in this cause is dismissed.

SO ORDERED AND ADJUDGED this 5th day of May, 2006.

/s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE